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Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors, and RUTGERS, THE STATE UNIVERSITY,

Petitioners,

—v.—

JOSEPH SAN FILIPPO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent suggests that the questions presented by petitioners are not proper for review because the facts of the case are unique and the Third Circuit (in addition to establishing three novel legal principles contrary to seven other courts of appeal and this Court's precedent) also remanded to the trial court for further discovery on a limited issue. He also suggests that extensive further proceedings will take place in the district court even if this Court grants the petition and

reverses on all the grounds presented by the petition. These suggestions are all incorrect.[1]

The limited additional discovery for which the Third Circuit remanded is solely on the issue of whether the University was aware of other employees who committed comparably egregious offenses and imposed discipline less severe than dismissal or no discipline at all (App. 19). Although discovery had been provided regarding other employees, the Third Circuit expanded the scope by its use of the word "comparable." The legal questions presented by the petition do not turn either on that issue or on the precise facts of this case. Further proceedings on remand will not sharpen or change those legal questions. This case is in an appropriate and timely posture for this Court's review of the questions presented by the petition because the district court is compelled to apply the Third Circuit's novel legal standards on remand. This Court's review and reversal of the Third Circuit's holdings on the legal questions presented would eliminate any need for the district court either to readdress the precise facts of the case or to reopen even limited discovery, because the district court would then be required to grant complete summary judgment for petitioners, as it had done originally.

Moreover, neither the precise facts of this case nor the proceedings on remand have any bearing on the pressing importance to all public employers (and hence the public) of having the legal questions presented herein decided by this Court now. How those questions are decided affects not only pending lawsuits but, more important, the making of personnel decisions by public employers on a daily basis. The tremendous burdens imposed by the Third Circuit's novel holdings chill decisionmaking by public employers that is essential to

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[1] Although the respondent's brief in opposition to the petition contains a number of inaccurate statements regarding the facts of record, discovery, and other matters, these do not bear directly on the questions presented by the petition; hence, petitioners do not reply to those inaccurate statements.

the public they serve. It does enormous harm to public institutions, that have an overriding public mission to fulfill, not to be able to dismiss employees for misconduct promptly and with any degree of certainty. Uncertainty undermines the institution's credibility with the public, victims of the misconduct, coemployees, and, in the case of educational institutions, students. Uncertainty also undermines the morale of employees who are capable of adhering to standards of conduct because they see their public employer disempowered from taking appropriate personnel action as to other employees who take encouragement from court decisions that they can misbehave with license.

A public employer in the Third Circuit can no longer discharge a public employee for egregious misconduct (even with due notice and an opportunity to be heard). Rather, the Third Circuit's standards could be read to require a public employer first to perform a background investigation to determine (1) whether the employee ever filed a grievance or lawsuit about anything; (2) whether any nondecisionmaking subordinate had an unarticulated, unconstitutional motive in favoring the employee's termination; and (3) whether any other employee ever committed comparably egregious misconduct, as yet undetected. If any of the foregoing are found on investigation, the public employer acts at its peril in discharging its employee for the egregious misconduct originally contemplated as the basis for its decision. Termination at that point virtually assures that the public employer will be faced with the need to defend a full-scale costly lawsuit through trial.

The need for review by this Court at this stage in the proceedings is apparent from the Third Circuit's statement, after it addressed the discovery issue:

> In light of our decision to vacate the district court's grant of summary judgment in San Filippo's first amendment

> claim, we *need* to address certain other issues that are *relevant* to the course of proceedings on remand.

(App. 20; emphasis added). The Third Circuit then enunciated as necessary and relevant to its remand decision the three new legal principles review of which is sought by the petition.

I. The First Amendment Petition Issue

First, the Third Circuit decided that a public employee's lawsuit or grievance that does not involve a matter of public concern is protected First Amendment activity. This is a wholly legal question that does not turn on the facts of this case. Further, the limited additional discovery for which the Third Circuit remanded is completely unrelated to this issue. Moreover, contrary to respondent's assertion (Brief in Opp. 17), the Third Circuit decision on the petition issue is necessary to its decision, as the court itself stated:

> The district court's conclusion that San Filippo engaged in some protected activity [speech] does not make this dispute [on the petition claim] academic. San Filippo wants, (a) the fact-finder to be instructed that dismissal in retaliation for any or all of his lawsuits and grievances constitutes a first amendment violation, and (b) to argue to the fact-finder that the close proximity in time between his 1985 lawsuits and the decision to file formal charges against him supports an inference of retaliation.

(App. 22n.14).

Finally, should this Court grant the petition and reverse the Third Circuit's decision, the district court's grant of summary judgment for petitioners on the First Amendment petition claim must be reinstated as a matter of law. Whether conduct is constitutionally protected is a question of law, not of fact. *Connick v. Meyers*, 461 U.S. 138, 148n.7 (1983). The district court has already determined that San Filippo's grievances and lawsuits do not involve matters of public concern (App.

81-83). Therefore, if this Court grants review and determines that a petition must involve a matter of public concern to be constitutionally protected activity for a public employee, as the district court previously held, summary judgment will be entered once again against San Filippo on his petition claim.

II. The Entity-Liability Degree of Culpability Issue

Second, the Third Circuit established a standard akin to negligence as the degree of culpability necessary to hold a governmental entity liable under 42 U.S.C. § 1983 for the acts of its non-decisionmaking subordinates, *i.e.*, a failure to "tread with a certain amount of care." This, too, is a wholly legal question that does not turn on the facts of this case. Further, contrary to San Filippo's assertion which completely mischaracterizes the nature and scope of discovery on remand (Brief in Opp. 22), the limited additional discovery on remand is completely unrelated to this issue.

Finally, should this Court grant the petition and reverse the Third Circuit's decision on this issue by reaffirming the deliberate indifference standard, summary judgment against San Filippo would be required on his only remaining claims, *i.e.*, his First Amendment claim within which his Equal Protection claim has been subsumed. Contrary to San Filippo's assertion (Brief in Opp. 22-23), a public employer's knowledge of a public employee's protected activity and a failure to investigate the unarticulated potentially unconstitutional motivations of nondecisionmaking subordinates does not establish deliberate indifference as that standard has been defined by this Court. *E.g. St. Louis v. Prapotnik*, 485 U.S. 112, 130 (1988) (failure to investigate not enough); *Canton v. Harris*, 489 U.S. 378, 388 (1989) (deliberate indifference standard).

III. The Purposeful Intent Issue

Third, the Third Circuit removed the purposeful intent element from a First Amendment retaliatory discharge claim and

substituted a negligence standard as the degree of culpability, *i.e.*, requiring the actual decisionmaker "to 'tread with a certain amount of care' to avoid 'the possibility of inadvertently punishing someone for exercising [his] First Amendment rights.' " (App. 44n.26). Resolution of this issue does not turn on the facts of this case and would not be affected by the further limited discovery for which the Third Circuit remanded the case.

Should this Court grant the petition and reverse the Third Circuit decision by reaffirming the purposeful intent standard, the district court once again would enter summary judgment against San Filippo. He expressly concedes that he does not claim that the decisionmaking Board members themselves were motivated by his First Amendment activities in their decision to dismiss him (A255, 222-27).

In sum, all of the questions presented are ripe for review. This Court routinely reviews legal standards announced by the courts of appeals to be applied by the district courts in further fact-finding proceedings on remand. For example, in *Waters v. Churchill*, ___ U.S. ___, ___ S.Ct. ___, 128 L.Ed.2d 686 (1994), this Court reviewed a legal standard announced by the Seventh Circuit to be applied by the district court in further fact-finding proceedings on remand, where the Seventh Circuit had vacated the district court's grant of summary judgment. 128 L.Ed.2d at 703. *See also Canton v. Harris*, 489 U.S. 378 (1989) (where the Sixth Circuit had affirmed the district court on the question on which certiorari was granted, but reversed and remanded for a new trial on other grounds).

Of paramount importance is the real need of public employers in the Third Circuit to have that court's holdings, which establish novel legal principles contrary to seven other courts of appeals and this Court's precedent, reviewed now.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for Writ of Certiorari, the Court should grant a writ of certiorari on the three questions presented therein.

Respectfully submitted,

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